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In the Supreme Court of the United States

OCTOBER TERM, 1987

MERYL SUE BAKER, PETITIONER

v.

DEPARTMENT OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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EDITOR'S NOTE

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QUESTION PRESENTED

Whether the Privacy Act of 1974, 5 U.S.C. (& Supp. III) 552a, grants an individual a right to obtain amendment of a record that is maintained by an agency but is not retrieved by use of his name or other personal identifier.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 814 F.2d 1381. The order of the district court (Pet. App. 13a-14a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 12a) was entered on April 14, 1987. By order dated July 1, 1987, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including August 17, 1987, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a civilian employee of the Department of the Navy, serving as a Supervisory Personnel Research Psychologist at the Personnel Research and Development Center in San Diego, California. In February 1985, Dr. Eugene Rocklyn, one of petitioner's subordinates at the

Center, filed an administrative grievance against her. The Navy subsequently assigned Lieutenant Commander Ken Davis to investigate Dr. Rocklyn's charges. Lieutenant Commander Davis prepared a memorandum of his findings (the Davis report), and that report was placed in the file pertaining to Dr. Rocklyn's grievance. The Davis report was not placed in petitioner's personnel file and was not indexed or cross-referenced to petitioner's name or file. Pet. App. 4a.

In July 1985, petitioner submitted a request for access to the Davis report in Dr. Rocklyn's file, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. (& Supp. III) 552, and the Privacy Act of 1974, 5 U.S.C. 552a(d). Petitioner gained access to an edited version of the Davis report under the FOIA in August 1985.[1] In September 1985, petitioner submitted a request under the Privacy Act, 5 U.S.C. 552a(d)(2), to amend the Davis report or to expunge it altogether from Dr. Rocklyn's file. The Center's Commanding Officer denied her request, explaining that because the Davis report could not be retrieved by reference to her name or personal identifier, it is not, as regards petitioner, a record subject to the Privacy Act. Nevertheless, as a matter of administrative discretion, the Commanding Officer offered to allow petitioner to submit a written rebuttal to the Davis report, which would be appended to the report. Petitioner declined that offer. Pet. App. 4a-5a.

2. a. Petitioner then brought this action in the United States District Court for the Southern District of Califor-

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[1] Petitioner subsequently filed an administrative grievance alleging employment discrimination and retaliation. She contended that she was improperly demoted from a supervisory to a nonsupervisory position, issued a letter of reprimand, and rated "marginal" in her performance. Pursuant to a settlement of that matter, the Navy restored petitioner to her supervisory position, expunged the letter of reprimand from her personnel file, and changed her performance rating from "marginal" to "outstanding." Pet. App. 4a.

nia, under the Privacy Act, 5 U.S.C. 552a(g)(1), seeking amendment or expungement of the Davis report in Dr. Rocklyn's file, an injunction prohibiting dissemination of the report, and damages (Pet. App. 3a). The district court granted the Navy's motion for summary judgment, finding that the Davis report is not a record for purposes of the Privacy Act because it is not retrieved by use of petitioner's name or other personal identifier, which, under 5 U.S.C. 552a(a)(4) and (5), is a precondition to application of the Act. Pet. App. 13a-14a.

b. The court of appeals affirmed (Pet. App. 1a-11a), rejecting petitioner's contention that because the Navy allegedly took adverse action against her in the past based on the Davis report, the report was subject to amendment at her request under the Privacy Act (*id.* at 6a). Like the district court, the court of appeals construed the access provision of the Act, 5 U.S.C. 552a(d)(1), to apply to a record about an individual only when that record is contained within a "system of records" from which it is retrieved by use of the requester's name or personal identifier (Pet. App. 6a-10a). The court found support for "using a record's method of retrievability to determine the scope of accessibility" (*id.* at 9a) in the text and legislative history of the Privacy Act, the Office of Management and Budget's Guidelines construing the Act, the Navy Department's regulations implementing the Act, and settled case law (*id.* at 7a-9a).

The court of appeals further held that the language of the Privacy Act compels the conclusion that "an amendment to a record that is inaccessible under the Privacy Act cannot be made even if the record is otherwise accessible (as in this case, under the Freedom of Information Act)" (Pet. App. 10a). The court noted that the subsections of the Act that grant access to records (5 U.S.C. 552a(d)(1)), permit requests for amendment (5 U.S.C. 552a(d)(2)), and

require that records used in making determinations about individuals be maintained in a reasonably accurate and complete manner (5 U.S.C. 552a(e)(5)) all apply only to an agency that "maintains a system of records" (Pet. App. 10a). In the court's view, this language "suggests that the scope of accessibility and the scope of amendment are coextensive"—an interpretation the court found supported by the Privacy Protection Study Commission's report on the Privacy Act soon after it was passed. See *Personal Privacy in an Information Society* 503-504 (1977). Pet. App. 10a.

Finally, the court rejected petitioner's contention that a broader application of the Act is required because an agency might seek to circumvent the Act by neglecting to index a particular record pertaining to an employee under that employee's name (Pet. App. 11a). The court explained that the limitation of the access and amendment provisions of the Act to records that are retrieved by use of the requester's name or other identifier promotes efficiency and protects against the administrative burden that federal agencies otherwise would experience if they were effectively required to establish " 'elaborate cross-references among records' " (*id.* at 10a-11a, quoting 40 Fed. Reg. 28957 (1975)(OMB Guidelines)). The court also found that in this case, petitioner has "failed to set forth any evidence to support an allegation of evasive tactics by the Navy that would substantiate such a theory and preclude summary judgment" (Pet. App. 11a, citing *Kalmin* v. *Department of the Navy*, 605 F. Supp. 1492, 1495 n.5 (D.D.C. 1985)).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. The court of appeals followed the interpretation that was given to the access provision of the Privacy Act by OMB when it promulgated its Guidelines

in 1975 and that has been consistently followed by the courts ever since. This case therefore does not present any important issue warranting review by this Court.

1. As the court of appeals recognized, its interpretation of the access and amendment provisions of the Privacy Act is supported by the text, legislative history, and settled administrative and judicial interpretation of the Act.

a. A number of sections of the Privacy Act demonstrate that the provisions relevant here, which give an individual a right of access to records pertaining to him and an opportunity for amendment of any such records that are not reasonably accurate, are limited to records that are retrieved by use of the requester's name or other personal identifier. It is such records that presented the danger to which the Act was directed, and the Act's focus on such records keeps its administration within clearly identified and manageable limits.

The Act's definitional sections demonstrate that it is concerned with the contents of records that both (i) contain information about a particular individual, and (ii) may be retrieved by use of that individual's name or personal identifier. Thus, the Act defines the term "record" to mean "any item, collection, or grouping of information about an individual that is maintained by an agency * * * *and* that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph." 5 U.S.C. 552a(a)(4) (emphasis added). The Act then defines the term "system of records" as "a group of any records under the control of any agency *from which information is retrieved by the name of the individual* or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. 552a(a)(5) (emphasis added).

This scope of the Act also is reflected in the substantive provisions upon which petitioner relies. Under 5 U.S.C. 552a(e), an agency that maintains a "system of records" has a number of duties with respect to that system. Petitioner relies (Pet. 7) on 5 U.S.C. 552a(e)(5), which provides that an agency must maintain all records that are used in making any determination about an individual "with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination." Congress presumably contemplated that an agency could use a particular record in making a determination about an individual only if the record were retrieved by use of that individual's name or other personal identifier.[2]

Similarly, 5 U.S.C. 552a(d), which affords a right of access to records covered by the Act (5 U.S.C. 552a(d)(1)), applies to agencies that maintain a "system of records"; the definition of the quoted term alone suggests that the access provision is concerned with records that are retrieved by use of the requester's name or identifier. That limitation also is suggested by common sense: an agency could not realistically locate and afford access to all information anywhere in a potentially vast system of records that might mention the requester unless it maintained an elaborate cross-index.

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[2] Moreover, where, as here, the record is contained in another file, the agency typically would not use it to make a determination about the individual unless it was *in fact* retrieved from the other file and placed in the administrative record on which the determination was to be made. In the process, the record presumably would have been made part of a file from which it could be retrieved by using the individual's name or personal identifier, which would trigger application of the Privacy Act. Petitioner's contention (Pet. 9) that the court of appeals' construction will enable agencies to "mak[e] vital decisions on the basis of erroneous documents" therefore is without merit.

Section 552a(d) further provides that an agency maintaining a "system of records" must permit an individual who has a right of access to request amendment of a "record pertaining to him" that "the individual believes is not accurate, relevant, timely, or complete" (5 U.S.C. 552a(d)(2)). There is no reason to believe that Congress intended to confer on an individual a right to insist upon an amendment of a record that is contained not in his own personnel or other file, but in the file compiled about another person who has an independent interest in its contents. Moreover, the right to request amendment of an allegedly inaccurate record is one means of enforcing 5 U.S.C. 552a(e)(5), discussed above, which requires an agency to assure the reasonable accuracy of records that are to be used in making a determination about an individual. As we have explained (see page 6, *supra*), Congress presumably expected that an agency would use a record to make a determination about an individual only when it is retrieved by use of that person's name or other personal identifier.

Thus, the limitation the court of appeals applied in this case is woven throughout the operative provisions of the Privacy Act.[3]

b. The Guidelines promulgated by OMB in 1975 to assist federal agencies in their implementation of the Privacy Act construe the access provisions of the Act in the manner indicated by their language. Indeed, as the court of appeals observed, the Guidelines anticipated the precise

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[3] As the court of appeals observed, this interpretation of the Act also is supported by the legislative history, which reflects a congressional concern about the possible misuse of personally identifiable information stored in computers. See Pet. App. 8a (citing S. Rep. 93-1183, 93d Cong., 2d Sess. 1-2 (1974)).

question presented here. See Pet. App. 7a (quoting 40 Fed. Reg. 28957 (1975)(emphasis added by the court)):

> Congress did not intend to require that an individual be given access to information which the agency does not retrieve by reference to his or her name or some other identifying particular. * * * If an individual is named in a record about someone else * * * and the agency only retrieves the portion pertaining to him by reference to the other person's name * * * the agency is not required to grant him access. Indeed, if this were not the case, it would be necessary to establish elaborate cross-references among records, thereby increasing the potential for privacy abuses.
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> * * * * *
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> [Example:] A reference to Joan Doe in a record about James Smith in the same file. This is * * * a record within a system but Joan Doe would not have to be granted access unless the agency had *devised and used* an indexing capability to gain access to her record in James Smith's file.

The interpretation given the Privacy Act in the Guidelines issued by OMB, which was expressly given responsibility by Congress to oversee the implementation of the Act,[4] is entitled to deference by the courts (see Pet. App. 8a-9a)—especially since the Guidelines were promulgated soon after the Act was passed and they formed the basis for the procedures followed by all federal agencies in their implementation of the Act. This requirement of deference to the OMB Guidelines also was recognized by the District of Columbia Circuit in the decision upon which petitioner

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[4] The Office of Management and Budget promulgated its guidelines pursuant to Section 6 of the Privacy Act, which directs OMB to issue guidelines "for the use of agencies in implementing [the Act]" and to "provide continuing assistance to and oversight of the implementation of [the Act] * * * by agencies." 5 U.S.C. 552a note.

principally relies in urging the Court to grant review. See *Albright* v. *United States*, 631 F. 2d 915, 919-920 n.5 (D.C. Cir. 1980).

c. Finally, the court of appeals' interpretation of the access and amendment provisions of the Privacy Act is supported by the uniform holdings of the other courts that have considered the scope of the access provision. See *Cuccaro* v. *Secretary of Labor*, 770 F.2d 355, 360 (3d Cir. 1985); *Boyd* v. *Secretary of the Navy*, 709 F.2d 684, 686 (11th Cir. 1983), cert. denied, 464 U.S. 1043 (1984); *Kalmin* v. *Department of the Navy*, 605 F. Supp. 1492, 1495 (D.D.C. 1985); *Grachow* v. *Customs Service*, 504 F. Supp. 632, 636 (D.D.C. 1980); cf. *Savarese* v. *Department of HEW*, 479 F. Supp. 304, 307 (N.D. Ga. 1979), aff'd mem. *sub nom. Savarese* v. *Harris*, 620 F.2d 298 (5th Cir. 1980) (Table), cert. denied, 449 U.S. 1078 (1981) (Pet. App. 7a-9a).[5]

2. a. There is no merit to petitioner's contention (Pet. 6-8) that the decision below conflicts with *Albright* v. *United States*, 631 F.2d 915 (D.C. Cir. 1980). *Albright* involved 5 U.S.C. 552a(e)(7), which generally prohibits an agency from collecting, maintaining, or using records describing how any individual exercises his First

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[5] It is unclear whether petitioner renews before this Court her argument that the Privacy Act's amendment provision, 5 U.S.C. 552a(d)(2), applies to the allegedly inaccurate Davis report (see 5 U.S.C. 552a(e)(5)) that is accessible in some other manner (here, under the FOIA) but is not retrieved by use of her name. In any event, the court of appeals correctly rejected that contention, relying on the language of the Act limiting those provisions to an agency that "maintains a system of records" (Pet. App. 10a). Cf. *Thomas* v. *Department of Energy*, 719 F.2d 342, 345-346 (10th Cir. 1983); *Olberding* v. *Department of Defense*, 709 F.2d 621, 622 (8th Cir. 1983); *Clarkson* v. *IRS*, 678 F.2d 1368, 1377 (11th Cir. 1982); *Doyle* v. *Behan*, 670 F.2d 535, 538-539 (5th Cir. 1982); *Hanley* v. *Department of Justice*, 623 F.2d 1138, 1139 (6th Cir. 1980).

Amendment rights. The District of Columbia Circuit held that that prohibition applies to the collection of a record even though it has not been incorporated into a system of records. 631 F.2d at 918-920. However, the expansive construction of Subsection (e)(7) in *Albright* rested primarily upon a perceived congressional intent to afford First Amendment rights "special and sensitive" treatment under the Privacy Act. 631 F.2d at 919. Thus, the court emphasized that the Act's legislative history reveals Congress's "special concern for the protection of First Amendment rights, as borne out by statements regarding 'the preferred status which the Committee intends managers of information technology to accord to information touching areas protected by the First Amendment of the Constitution' " (*ibid.*, quoting S. Rep. 93-1183, 93d Cong., 2d Sess. 56 (1974)).

Although *Albright's* conclusion that Subsection (e)(7) has a uniquely broad scope has been adopted by the Eleventh Circuit (see *Boyd* v. *Secretary of the Navy*, 709 F.2d at 687; *Clarkson* v. *IRS*, 678 F.2d 1368, 1373-1375 (11th Cir. 1982)) and, indeed, by the Ninth Circuit in another case (see *MacPherson* v. *IRS*, 803 F.2d 479, 481 (9th Cir. 1986)),[6] no court of appeals has applied that broad rule of construction to any other provision of the Privacy Act, including the accuracy, access and amendment provisions at issue here.[7] Moreover, the Eleventh Circuit has specifically held that *Albright*'s expansive

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[6] In light of the Ninth Circuit's adoption of *Albright*'s broad construction of Subsection (e)(7) in *MacPherson*, there is no merit to petitioner's contention (Pet. 8-9) that a plaintiff who files suit in the Ninth Circuit will have narrower Privacy Act rights than a plaintiff who files suit in the District of Columbia Circuit will have under *Albright*.

[7] In fact, in *Albright* itself, the District of Columbia Circuit expressly distinguished *Denson* v. *Alexander*, No. 76-L1332-S (N.D. Ala. Feb. 2, 1977), which held that the access and amendment provisions of the Act apply only to records incorporated into the agency's system of records, from which they can be retrieved by use of an individual's name or other personal identifier. Without expressing a

construction of Subsection (e)(7) does not extend to Subsection (e)(5), which petitioner invokes in this case and which, like the access provision, applies only to those records that are contained in a "system of records." See *Clarkson* v. *IRS*, 678 F.2d at 1377, discussed at note 5, *supra*; see also *Fagot* v. *FDIC*, 584 F. Supp. 1168, 1175 (D.P.R. 1984) (emphasis added) ("[t]he *only* exception to * * * the 'system of records' requirement refers to violations of 5 U.S.C. Sec. 552a(e)(7)"), aff'd in part and rev'd in part, 760 F.2d 252 (1st Cir. 1985) (Table). Petitioner's contention that the decision below conflicts with *Albright* therefore is without merit.[8]

b. There also is no merit to petitioner's contention (Pet. 7-8) that the court of appeals' decision conflicts with *Chapman* v. *NASA*, 682 F.2d 526 (5th Cir. 1982). The Fifth Circuit held in *Chapman* that under 5 U.S.C. 552a(e)(5), when a supervisor's private notes bearing negatively on an employee's job performance are used to

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view as to the correctness of *Denson*, the District of Columbia Circuit observed that *Denson* concerned access to and correction of records that were properly in the possession of the agency, while the issue in *Albright* was whether the agency had properly collected the information in the first place. Petitioner does not contend that here, as in *Albright*, the agency had no authority to procure the Davis report in the first place.

[8] In *Dickson* v. *OPM*, 828 F.2d 32 (D.C. Cir. 1987), the court held that an individual may seek damages under 5 U.S.C. 552a(g)(1)(C) as a result of an agency's alleged failure to maintain accurate records, even if an adverse determination is made by another agency on the basis of the same records. *Dickson* has no bearing on this case. *Dickson* involved records that were in the plaintiff's own file, not, as here, in the file of *another* person. Moreover, petitioner seeks an amendment of a record so that it will conform with the accuracy requirement of 5 U.S.C. 552a(e)(5); unlike the plaintiff in *Dickson*, she does not seek only damages. In fact, the District of Columbia Circuit in *Dickson* expressly distinguished a claim under 5 U.S.C. 552a(e)(5) from a damage claim under 5 U.S.C. 552a(g)(1)(C). See *Dickson*, 828 F.2d at 38-39.

support a discharge decision, those notes must be incorporated into the employee's file in a timely manner, in order to allow the employee a fair opportunity to respond. 682 F.2d at 529. *Chapman* therefore proceeded on the premise that the records in question were covered by the Act, and it considered only the question of the agency's compliance with the "timeliness" requirement imposed by 5 U.S.C. 552a(e)(5). 682 F.2d at 529. This case, by contrast, presents no question pertaining to the timeliness requirement.

3. Finally, although the Privacy Act does not afford petitioner a right of access to the Davis report or a right to have the report amended while it is in Dr. Rocklyn's file, the Commanding Officer of the Center nevertheless offered her an opportunity to submit a rebuttal to the report, which would be filed with it in Dr. Rocklyn's file. Petitioner, however, declined that offer. See page 2, *supra*. Thus, it is pure hyperbole for petitioner to contend that the court of appeals has condoned the continued use of the Davis report to make "highly detrimental decisions regarding her employment" (Pet. 8). In fact, the court of appeals specifically found no basis for any claim of "evasive tactics" by the Navy (Pet. App. 11a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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